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THE RIGHT OF A FORMER SPOUSE TO SUPPORT AFTER AN EX PARTE DIVORCE

INTRODUCTION

In a series of cases beginning in 1955,[1] the California Supreme Court has held that a former wife may maintain an action to obtain permanent support from her former husband if the marriage was dissolved by a divorce decree rendered by a court that did not have personal jurisdiction over her. The Supreme Court has reasoned that the divorce court's lack of personal jurisdiction over the wife precludes the divorce court from making any binding adjudication affecting her marital support rights.[2]

This study will explore the ramifications of these decisions to determine whether there are unresolved legal problems in the area of post-divorce support and, if so, whether such problems can be solved legislatively. The study will consider both federal and sister-state law to the extent that they bear on the question of what the California law is or ought to be.

THE MARITAL RIGHT OF SUPPORT

Because the basis of the holdings that a former wife has a post-divorce right of support has been that the pre-divorce support rights are unaffected by a divorce decree rendered by a court without personal jurisdiction over her, the study of post-divorce support rights appropriately begins with an examination of a spouse's pre-divorce support rights.

California

Under existing California law, a husband is required to support his wife to the extent of his ability to do so.[3] He is not required to provide such

support, however, when she has abandoned him without just cause; nor is he required to provide such support when she is living separate from him pursuant to an agreement that does not provide for her support.[4] The husband's obligation to support his wife is independent of her need for that support, and he can be required to provide her with support commensurate with his station in life even though she is not dependent on him at all and has ample means of her own.[5]

The wife, too, has the duty to support her husband under existing California law.[6] She is obligated to provide such support, however, only when "he has not deserted her" and he is "unable, from infirmity, to support himself."[7]

The duty of a spouse to provide support to the other may be specifically enforced by an action brought for that purpose during the marriage.[8] Civil Code Section 137 seems to provide that a court may award separate maintenance only if the spouse seeking support establishes a cause for divorce or willful desertion or willful nonsupport by the defendant spouse.[9] It is well established, however, that a spouse may obtain a decree specifically enforcing the duty of support despite the fact that the grounds specified by statute for divorce or separate maintenance cannot be established.[10]

A separate maintenance decree may be modified to increase the support awarded or to lengthen the period for which support is required; and it is unnecessary for the court to reserve jurisdiction in order to exercise this power of modification.[11]

Other states

At common law, a husband was required to support his wife; but the wife had no duty to support her husband.[12]

The Commissioners on Uniform State Laws reported in 1964 that all American jurisdictions retain the rule requiring the husband to support his wife (in Texas the liability is for necessities only) and that 27 American jurisdictions now require the wife to support her husband when he is in need.[13]

Although the common law denied a spouse the right to bring an action for support,[14] virtually all American jurisdictions will judicially enforce the obligation to support either through a statutory action for separate maintenance or through an action in equity independent of statute.[15] Most states regard the action for separate maintenance as equitable in the sense that a court of equity has inherent power to entertain the proceeding.[16] In such jurisdictions, statutes authorizing support actions are not regarded as restrictions on the inherent powers of the equity court.[17] Some states, however, limit a spouse to the statutory conditions for relief upon the theory that the action was unknown to the common law and the right to separate maintenance is necessarily limited, therefore, by the statute that created the right.[18]

Interstate problems

These differing duties of support would cause few problems if married persons would stop migrating from state to state. But inasmuch as the American population is highly mobile, support problems frequently arise that involve the laws of more than one jurisdiction.

Marital support rights pursuant to judgment. Let us consider first the situation where a support decree is made in one state and the decree is sought to be enforced in another state.[19]

Section 1 of Article IV of the United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The United States Supreme Court has held that a judgment for support, or separate maintenance, must be accorded by the various states "the same binding force that it has in the state in which it was originally given."[20] If the support award is payable in future installments, the right to such installments "becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause."[21] If, however, the support award is modifiable by the court that rendered the decree, full faith and credit need not be accorded to the decree.[22]

The full faith and credit clause, however, does not forbid a court from enforcing a modifiable decree rendered by a court of another state.[23] If a modifiable decree is to be enforced by another state, due process requires that the defendant be given notice and the opportunity to litigate the question of modification.[24] The state of California will enforce modifiable decrees for support after trying the issue of modification on the merits.[25]

The Uniform Reciprocal Enforcement of Support Act was promulgated by the National Conference of Commissioners on Uniform State Laws in 1950, and it has been twice revised by the National Conference since then.[26] In either its original or an amended form it has been enacted in every American jurisdiction except New York, and New York has enacted a Uniform Support of Dependents Law that is similar.[27] It seems likely that modifiable decrees will be enforceable under the provisions of the Reciprocal Act.[28] If this is so, then despite the Supreme Court's refusal to apply the full faith and credit clause to modifiable support decrees, such decrees are enforceable in virtually all American jurisdictions.

Thus far we have considered the enforceability of a support decree in a state other than that where the decree was rendered. We must now consider the negative force of a support decree--the extent to which such a decree will bar another action for support in a different jurisdiction.

To the extent that the original decree is modifiable (as in California),[29] it seems clear that a support decree cannot bar further relief for the second court has the power to modify the decree. But if the original decree is not modifiable, a more difficult problem is presented.

No decision of the United States Supreme Court has been found that involves the specific problem; but Yarborough v. Yarborough,[30] decided in 1933, involved substantially the same issue. That case involved a Georgia couple who were divorced in Georgia. The Georgia decree ordered the husband to pay a lump sum support award to the wife for the support of their child. Under Georgia law, compliance with the Georgia decree fully discharged the husband's support obligation to the child, and no subsequent judgment for support could be rendered against him. Thereafter, the mother and child migrated to South Carolina; and about 1 1/2 years later, the child sued her father in South Carolina

for additional support. The defendant father appeared personally in the South Carolina action.

The majority opinion (by Mr. Justice Brandeis) held that the Constitution required South Carolina to give the Georgia judgment the same faith and credit that the judgment would have in Georgia. Accordingly, the South Carolina court could not order the defendant father to pay any additional support to his child, for to do so would deny full faith and credit to the Georgia judgment.

Justices Stone and Cardozo dissented in an opinion by Justice Stone. The dissent argued that South Carolina's interest in its domiciliary minor should enable it to regulate the incidents of the parent-child relationship within South Carolina. The Georgia judgment should be considered merely as regulating the incidents of the parent-child relationship within Georgia. It should not be read as purporting to regulate the relationship in places outside of Georgia where the parties might later come to reside.

The Yarborough decision thus indicates that the full faith and credit clause forbids a court from granting further support to a spouse who has exhausted her support rights under an unmodifiable support decree rendered by a court of another state.

Marital support rights where no prior judgment. So far we have considered interstate problems that exist when a support award is sought after a previous support decree has been made. We now consider interstate problems where there has been no previous support decree. Such problems may arise when either the spouse seeking support or the spouse from whom support is sought--or neither--resides in the state where the support action is brought.

Most states will entertain an action for separate maintenance brought by a nonresident spouse against a spouse who is resident in the state.[31] Few

cases have involved the issue, but apparently the cases are divided on whether a support action can be maintained where neither spouse is resident in the state of the forum.[32]

In California, residence is not a jurisdictional requirement in separate maintenance actions.[33] No California case has been found involving two nonresident spouses; but a dictum indicates that California would entertain a support action even though neither spouse were a resident of the state.[34] Dimon v. Dimon[35] was a support action involving two nonresidents. The case was decided in part on the ground that an ex parte divorce previously awarded to the plaintiff terminated the plaintiff's right to support from the defendant. The portion of the opinion relating to the effect of an ex parte divorce upon the marital right of support has been overruled.[36] But the case also held that an action for support could be maintained on behalf of a nonresident child against a nonresident father. The dissenting opinion in Dimon contended that support could be awarded to the former wife regardless of the fact that both parties were nonresident.[37] Since the majority opinion in Dimon was overruled in an opinion by the author of the Dimon dissent, it is at least arguable that the views expressed in that dissent now constitute the law of California. This conclusion seems doubly warranted because even the majority in Dimon held that relief could be granted against the nonresident father on behalf of the nonresident child and did not suggest that the nonresidence of the former spouses was a bar to relief as between them. Moreover, Civil Code Section 244 (enacted in 1955)[38] now provides that "An obligor present or resident in this State has the duty of support as defined in this title regardless of the presence or residence of the obligee." Thus, it seems reasonably clear that, under California law, a nonresident spouse may maintain an action for support against the other nonresident spouse.

In a concurring opinion, the Chief Justice of the New Hampshire Supreme Court has pointed out that those states that hold to the rule barring support actions by nonresidents are preserving a rule that is out of harmony with recent statutory developments in those states.[39] All American jurisdictions now have enacted reciprocal enforcement of support legislation that permits a spouse who is resident in one state to begin a support action in that state that ultimately will be enforced against the other spouse in another state.[40] Thus, all states will now entertain a support action brought by a nonresident spouse pursuant to the procedures specified in the reciprocal support legislation. States retaining the rule that support actions can be maintained only by residents, therefore, merely require the spouse seeking support to remain out of state and sue under the reciprocal act instead of permitting the spouse to recover in a direct intrastate action where both parties are before the same court.

What law is to be applied in a support action between spouses who reside in different jurisdictions?

The few cases that have considered choice of law problems in support of dependents litigation seem to establish the following propositions: (1) A state will enforce a duty of support imposed by its own laws upon a resident of the state despite the nonresidence of the person to whom the duty of support is owed.[41] (2) A state will enforce a duty of support arising under the law of another state when the person from whom support is claimed is a resident of that other state.[42] (3) A state will not enforce against one of its own residents a duty of support imposed by the laws of another jurisdiction.[43]

Illustrative of the foregoing propositions is the 1958 Texas case, State of California v. Copus.[44] That was a case brought by the State of California to recover the cost of supporting the defendant's mother in a

California mental hospital. The defendant was liable for such support under California law,[45] but the Texas court held that there was no comparable Texas law requiring the child to support his parent.[46] During the period that the defendant's mother was confined in the California mental hospital, the defendant moved his domicile from California to Texas. The Texas court held that California could recover from the defendant for the period during which he was a California resident, but California could not recover upon the obligation imposed by its laws for the period during which the defendant was a Texas resident. The original version of Section 7 of the Uniform Reciprocal Enforcement of Support Act provided:

> Duties of support enforceable under this law are those imposed or imposable under the laws of any state where the alleged obligor was present during the period for which support is sought or where the obligee was present when the failure to support commenced, at the election of the obligee.[47]

Although both California and Texas had enacted[48] this version of Section 7, the Texas court dismissed it from consideration on the ground that California's action was not being prosecuted under the reciprocal act.[49]

In Commonwealth v. Mong,[50] the Ohio Supreme Court held that Section 7 of the reciprocal support act, which had been enacted in Ohio, could not constitutionally require an Ohio defendant to support a Pennsylvania dependent as required by Pennsylvania law when Ohio law did not require the defendant to provide such support.

In 1952, the Uniform Law Commissioners amended the above quoted provision of the reciprocal support act to read:

> Duties of support applicable under this law are those imposed or imposable under the laws of any state where the obligor was present during the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.[51]

All American jurisdictions except New York (New York has comparable legislation) have enacted the Uniform Act;[52] but only four states--California, Massachusetts, Mississippi, and Texas--have retained the substance of the originally recommended Section 7.[52.1]

The meaning of the currently recommended version is not altogether clear. Its lack of clarity is indicated in the following hypothetical cases: California requires a wife to support her husband when he is in need, Arizona does not.[53] Suppose W leaves her needy husband, H, in California and establishes a separate residence first in California and then in Arizona. If H sues for past and future support under the reciprocal act, Section 7 may mean that W can be held liable for all past and future support because she was present in California for a portion of the period for which support is sought. On the other hand, Section 7 may mean that W can be held liable for H's past support for that period while she was still present in California but that she cannot be held liable for H's support for the period of her Arizona residence. Under this latter view, W could not be liable for future support; but under the former view, W could be held liable for future support because of her presence in California for a portion of the period for which support is sought.

Suppose, then, that W continues to support H until after she has established an Arizona residence. Then she terminates her support and H sues under the reciprocal support act. Under these facts, W was not present in California for any portion of the period for which support is sought; hence, under any interpretation of the section, W cannot be held liable for H's support, for H's claim for support does not cover any period of time during which W was present in California.

Suppose, further, that W did not terminate her support to H until after

establishing an Arizona residence, but she returned to California at a later time on a weekend trip. Does the weekend in California revive the entire claim of H for support because of W's presence in California for a portion of the period--the weekend--for which support is sought?

Finally, the wording of Section 7 suggests that it could be H's claim for support--not his right to support--that fixes the period used to determine the applicable state law. Section 7 provides that the duty of support is that imposed or imposable under the law of any state where the obligor was present during the period "for which support is sought." Does this mean that if H seeks support for the period that W was a California resident--even though he is not entitled to support for that period--that the California law can be applied to determine W's duty of support, but that if H does not make his nonmeritorious claim Arizona's law must be applied?

We suggest that an interpretation of Section 7 that ties the duty of support to nonmeritorious allegations in the plaintiff's pleading is unsound. We suggest, too, that an interpretation of Section 7 that ties the duty of support to the fortuity of whether W has ever passed through any state that requires wives to support needy husbands is unsound. We think that the reciprocal act is concerned with the presence of the parties during the period for which support is sought. Under this view, W would be liable for H's past support--and Arizona would be required to enforce H's claim--for that period during which W was a California resident. But W would not be liable for H's support for that period during which she was an Arizona resident. W would not be liable for future support as long as she remained an Arizona resident.

That this interpretation is the correct one seems to be supported by the Commissioners' Note,[54] which indicates that revised version is based on concepts and principles set forth in an article by Dean Stimson of the University

of Idaho Law School that appeared in the American Bar Association Journal in 1950.[55] In that article, Dean Stimson argued that the proper rule to be applied in determining personal rights and duties between persons in different states is that "the applicable law is the law to which the person alleged to be under a duty was subject at the significant time and not the law to which the person claiming the right was subject."[56]

It should be noted, too, that Dean Stimson's article argues that choice of law rules should be based on physical presence, not domicile.[57] It is arguable, therefore, that the use of the word "presence" in Section 7 of the revised Uniform Reciprocal Enforcement of Support Act was intended to mean physical presence, not domicile. Nonetheless, some commentators on the uniform act seem to interpret the section as referring to residence or domicile.[58] Under this interpretation, Section 7 merely states in statutory form the substance of the Texas court's holding in the Copus case.[59] Since this view will be easier to administer than an interpretation based on an accounting of every minute of the obligor's time, it is not unlikely that courts will come to the same conclusion as the commentators as to the meaning of Section 7.

It is clear, therefore, that under the law of all but the four American jurisdictions retaining the original version of Section 7, the duty of one spouse to support the other must be determined under the law of the state where the spouse from whom support is sought is "present" or resides. And even in Texas, which retains the original version of Section 7, the determination of the applicable rule is made in the same way unless enforcement is sought under its provisions of the reciprocal support act.

THE EFFECT OF DIVORCE

Thus far, we have considered the rights and duties of support that arise out of marriage. We must now determine what effect divorce has upon these rights and duties. We will consider the effect of both divorces granted by courts with personal jurisdiction over both spouses and divorces granted by courts with personal jurisdiction over one spouse only.

Divorce granted by court with personal jurisdiction over both spouses

California. Civil Code Section 139 authorizes a California court to require a person against whom a divorce decree is granted to pay a suitable allowance to the party to whom the divorce is granted for support and maintenance. Under familiar principles of due process, such an order for support is not binding on the party required to provide the support unless the court had personal jurisdiction over him.[60]

In theory, the allowance permitted by Section 139 is not a continuance of the marital right of support. It is considered to be compensation to the injured spouse for the loss suffered as a result of the other's breach of the obligations of the marital relationship.[61]

Accordingly, support may not be awarded under Section 139 to the party against whom is granted a decree of divorce.[62] If both parties are granted a divorce, or if one is granted a divorce and the other a decree of separate maintenance, the court may award support to either party after considering the application of the equitable doctrine of "clean hands."[63] A court is without jurisdiction to award support to a party against whom a divorce is granted unless that party is also granted a divorce or separate maintenance decree in the same proceeding.[64] Even if a separate maintenance decree has

been granted to a spouse, if a divorce is later granted against that spouse, the rights arising under the prior separate maintenance decree cease.[65]

There is an exception to the rules stated in the preceding paragraph. A divorce granted on the ground of incurable insanity does not relieve the spouse to whom the divorce is granted from any duty of support that arises out of the marital relationship.[66]

In requiring support to be paid pursuant to Section 139, the court is required to consider the circumstances of both parties.[67] The need of the spouse requesting support as well as the ability of the other spouse to provide support must be considered.[68] A support order made pursuant to Section 139 may be modified or revoked by the court as to support installments that have not yet accrued, but Section 139 forbids the modification or revocation of any support order as to amounts that have accrued prior to the order of modification or revocation.[69]

If a court makes no award of support under Section 139 in a divorce decree, it lacks the power to modify the decree to provide for support at a later time.[70] Similarly, a decree providing support for a limited time may not be modified after the expiration of such time to provide for additional support.[71] However, a court may make an award of a nominal sum in order to retain jurisdiction to modify the decree to provide for additional support at a later time.[72]

Other states. The purpose of this study does not require an extensive analysis of the laws of other states. It is sufficient for our purpose to note how the laws of the several states differ from the law of California.

In a few states, a divorce terminates the right to support; hence, a court cannot grant permanent alimony as an incident to a divorce decree.[73] In those states where alimony can be granted as an incident of divorce, it is usually regarded as being based on the marital right of support and not as compensation to the injured spouse.[74] In some states, support may be awarded to a guilty spouse.[75] In some states a support order may be modified both as to accrued support installments and as to unaccrued support installments.[76] And, a few states permit a court to modify a divorce decree to provide for support even though no support order was made in the original decree and the court did not expressly reserve jurisdiction to make a support order at a later date.[77]

Interstate problems. Where there has been a divorce decree rendered containing an order for support, the problems presented are no different in kind than those presented by a separate maintenance order; and the discussion appearing above at pages 4-6 is apposite.

Where there has been a divorce decree, containing no order for support, rendered by a court of a state--such as California--where the decree bars any subsequent support award, the full faith and credit clause of the United States Constitution probably bars any subsequent support award by a court of another state.[78]

Where the divorce court lacks power to pass on a claim for support, the decree will not bar a subsequent claim for support made to a court of another state.[79]

If the original divorce decree were rendered by a court of a state--such as New Jersey--where a subsequent support order is not barred by the failure of the court to award support in the original divorce action, several tenable

views may be advanced as to the propriety of a subsequent support claim made in the courts of another state.

If one accepts the argument that modifiable judgments should be subject to the full faith and credit clause, or even if the forum state generally enforces modifiable judgments as a result of its views of comity, it can be argued that the forum should decide the claim for support just as it would if it were a court of the state that granted the original divorce, whether or not either or both of the parties are still residents of the divorcing jurisdiction. That original divorce contemplated that the spouse from whom support is sought should provide support at a later time when such support became needful. The court did not reserve jurisdiction either expressly or by making a nominal support award because it was unnecessary to do so; nevertheless, the decree should be treated just as if the court had reserved jurisdiction to modify a nominal award, for that was the legal effect of the decree in the state where the decree was granted.

It may also be argued, however, that the divorce decree did not decide nor purport to decide the issue of future support. That matter was left at large and should be decided by application of the appropriate state laws as of the time when support is actually sought. In effect, the divorcing state's law requires a former spouse to support the other former spouse when the latter is in need. But this view of the requirements of public policy should not be forever binding on all of the other states in the union merely because the former spouses were domiciled there when the divorce was obtained. Unless the spouse from whom support is sought or the spouse seeking support still resides in a state requiring former spouses to provide support, there is no reason to apply the law of the state where the divorce was granted.

If the law of the divorcing state is not applied, the principles discussed above, pages 8-12, indicate that the applicable law should be the law of the state where the spouse from whom support is sought resides.

Ex parte divorce

The Supreme Court of the United States has thus far insisted that a divorce decree, to be accorded full faith and credit, must be awarded by a court of a state where at least one of the parties to the divorce is domiciled.[80] It is unnecessary, however, for both parties to reside in that state; the divorce must be accorded full faith and credit even though the defendant spouse is not subject to the personal jurisdiction of the court, so long as the plaintiff spouse is a domiciliary of the state of the divorcing court.[81]

In this study, a divorce granted by a court that lacks personal jurisdiction over both spouses, but that has power to enter a decree that must be given full faith and credit insofar as it terminates the marriage, is referred to as an "ex parte divorce."

Our inquiry at this point is as to the effect of an ex parte divorce upon the rights and duties of support that were incident to the marriage. In this portion of the study, interstate problems will not be discussed separately. Instead, the attitude of the California courts toward interstate problems and the law of other states on interstate problems will be discussed under the headings of "California" and "Other states." Because the purpose of this study is to identify California problems and to suggest possible California solutions, the law of California will be discussed last.

Other states. In Estin v. Estin,[82] the United States Supreme Court held that a wife's rights under a separate maintenance decree granted by a New York court were unaffected by an ex parte divorce granted to the husband

by a Nevada court. Because the Nevada court lacked personal jurisdiction over the wife, the Supreme Court held that it lacked power to alter her rights under the New York judgment.

In Vanderbilt v. Vanderbilt,[83] the United States Supreme Court held that a New York court could constitutionally award support to a former wife despite the fact that her former husband had been granted an ex parte divorce by a Nevada court prior to the time she commenced her New York support action. The Supreme Court held that inasmuch as the wife was not subject to the Nevada court's jurisdiction, that court had no power to extinguish any right which she had under the law of New York to financial support from her husband.

These decisions were foreshadowed by concurring opinions that appeared in Armstrong v. Armstrong[84] and Esenwein v. Commonwealth ex rel. Esenwein.[85] In the Esenwein case, the court affirmed an order of a Pennsylvania court enforcing a support decree although the husband had obtained a Nevada divorce after the support decree had been rendered and although, under Pennsylvania law, the obligation of a support order terminates with a subsequent divorce. The holding was based on a determination that the Nevada decree was void because the husband never acquired a Nevada domicile; but the concurring opinion of Mr. Justice Douglas[86] (who had dissented in the second Williams case upon which the majority opinion relied) suggested that the decree of the Nevada court did not have to be accorded full faith and credit in an action for support.

The Armstrong case involved action for support brought by an ex-wife in Ohio against her former husband who had been previously granted a valid Florida divorce. The Supreme Court affirmed the Ohio support order on the ground that the Florida decree did not purport to adjudicate the wife's

support rights; hence, the Ohio court did not actually deny full faith and credit to the Florida decree. Mr. Justice Black (for four concurring justices) argued that the Ohio court was not required to give full faith and credit to the Florida decree to the extent that the Florida decree purported to affect the wife's support rights.

> Our view is based on the absence of power in the Florida court to render a personal judgment against Mrs. Armstrong depriving her of all right to alimony although she was a nonresident of Florida, had not been personally served with process in that State, and had not appeared as a party. It has been the constitutional rule in this country at least since Pennoyer v. Neff, 95 U.S. 714, decided in 1878, that nonresidents cannot be subjected to personal judgments without such service or appearance.[87]

So far as the federal cases are concerned, then, it appears that a divorce judgment cannot deprive a spouse of whatever right to support she may have as an incident of the marriage under the law of her domicile if she is not personally subject to the jurisdiction of the divorce court.[88]

The rationale of the federal cases seems to be as follows: The divorce court lacks power to make any binding adjudication of the absent spouse's support rights because of its lack of personal jurisdiction over that spouse.[89] To adjudicate the absent spouse's support rights would be to deprive that spouse of property without due process of law.[90] Lacking due process, the divorce judgment can be given no effect even in the state where rendered.[91] Since the divorce judgment can be given no effect on support rights in the state where rendered, the full faith and credit clause--which requires that it be given the same effect elsewhere that it has in the jurisdiction where rendered--does not require that it be given effect anywhere else.[92]

Not discussed in these cases is whether the court where support is sought would be permitted to recognize the termination of the marriage for the purpose of determining whether support rights incident to the marriage have terminated.

The cases thus far have merely held that the state where support is sought can disregard the divorce and grant support. But, if the due process clause would forbid the state that granted the divorce from holding that the divorce decree terminated the support rights of the absent spouse because such a holding would deprive the absent spouse of property without due process of law, it seems that recognition of the termination of the marital status by another state as a basis for denying support is equally a deprivation of property without due process of law.

The concurring opinion of Mr. Justice Douglas in the Esenwein[93] case suggests that the due process clause may require all courts to disregard an ex parte divorce decree when support is sought by a spouse who was not a party to the divorce action. The Esenwein case was decided the same day as the second Williams[94] case. Mr. Justice Douglas dissented in the Williams case on the ground that the divorce decree was not subject to attack under Nevada law, hence, the full faith and credit clause protected it from attack under North Carolina law. The Esenwein case also involved a Nevada divorce; and, under the domestic law of Pennsylvania where the Esenwein case arose, the right to support does not survive divorce. Despite his views on the credit that should be accorded a Nevada divorce, Justice Douglas concurred in the Supreme Court's decision permitting Pennsylvania to enforce the former wife's right to support. From this, it may be inferred that he believed that the Pennsylvania court would be forbidden by the due process clause from holding that the wife's support right could be adversely affected by the ex parte Nevada divorce that terminated her marriage.

Further support for this view may be found in Griffin v. Griffin[95] where the court held:

> A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. . . . Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment acquired elsewhere without due process.[96]

Whatever implications may be derived from close analysis of the language of the various Supreme Court opinions, all that can be determined with certainty at the present time is that a state may require a person to support his former spouse despite a prior ex parte divorce if such former spouse was not subject to the personal jurisdiction of the divorcing court.

The states have adopted a variety of rules to cope with the problems created by ex parte divorce.[97] In some states, the courts hold that the right of support is incident to a marriage, and if the marriage is terminated--even by an ex parte divorce--the right of support that is incident thereto also terminates. Other states hold that the right to support survives an ex parte divorce if the former spouse who is seeking support was the divorce defendant; but they deny post-divorce support if the former spouse who seeks support was the divorce plaintiff. Other states draw no distinction based on the identity of the divorce plaintiff and hold that the right of support will survive an ex parte divorce obtained by either spouse.

These rules, of course, are subject to modification as the full faith and credit clause is found to be applicable. For example, it is clear now that a state granting an ex parte divorce cannot hold that a nondomiciliary defendant's right of support is terminated because the marriage to which it was an incident is also terminated.[98] And, it seems likely that the full faith and credit clause requires all courts to deny post-divorce support to a former spouse who was the divorce plaintiff if, under the law of the state where the divorce was granted, the right of support does not survive an ex parte divorce.[99]

California. In 1946, a Connecticut court awarded Mrs. Sara Jane Dimon a divorce from her husband who was then a resident of New York. Mr. Dimon was not served personally in Connecticut and did not appear in the Connecticut proceeding. Soon thereafter, Mr. Dimon established a new home in Nevada, and Mrs. Dimon moved to Oregon. During one of Mr. Dimon's occasional visits to California, Mrs. Dimon sued him in California for her past and future support.[100]

The case found its way to the California Supreme Court, which held that the Connecticut divorce terminated all of Mrs. Dimon's further right to support from Mr. Dimon.[101] Despite the fact that neither party was a resident of California, the court based its decision on the absence of any provision in the California statutes for a separate maintenance action between parties who were no longer married to each other. There was no discussion of whether Mrs. Dimon was entitled to support under Connecticut, New York, Nevada, or Oregon law. Mr. Justice Traynor dissented. He argued that the Connecticut court's lack of personal jurisdiction over Mr. Dimon prevented Mrs. Dimon from prosecuting her support claim in the divorce action; hence, she should not be barred from prosecuting her support claim in a forum where personal jurisdiction over Mr. Dimon could be obtained. He opined that a former wife should not have a right to sue for support following an ex parte divorce if such an action could not be maintained in the courts of the state where she was domiciled at the time of the divorce. If she was the divorce plaintiff, full faith and credit would require the courts of this state to hold that the divorce ended her right to support, since the divorce would have that effect in the state where granted. If she was not the divorce plaintiff, but under the law of her domicile her right of support did not survive the ex parte divorce granted her husband, she should "not be allowed, by migrating

to another state, to revive a right that had expired."[102] But, if her right of support survived the divorce under the law of her domicile at the time of the divorce, she should be able to maintain an action to enforce that right in the California courts.

Mr. Justice Traynor's views in the Dimon case are significant, for he was the author of the majority opinions in the subsequent cases of Worthley v. Worthley,[103] Lewis v. Lewis,[104] Hudson v. Hudson,[105] and Weber v. Superior Court.[106]

Worthley v. Worthley[107] held that an action could be maintained in California on a modifiable New Jersey separate maintenance decree even though the defendant husband, subsequent to the New Jersey judgment, was granted an ex parte divorce in Nevada. In so holding, the court looked to the New Jersey law to discover whether the wife's rights under the separate maintenance decree survived the ex parte divorce.

Lewis v. Lewis[108] involved an Illinois separate maintenance decree rendered after the defendant husband had been awarded an ex parte divorce in Nevada. Again, the Supreme Court held that California would enforce the Illinois decree. The Nevada divorce was entitled to full faith and credit on the question of the parties' marital status, but the Illinois judgment (which was not modifiable as to accrued installments) was entitled to full faith and credit on the question of the duty of support. That the wife's right of support survived the divorce under Illinois law was, of course, determined by the Illinois judgment.

Hudson v. Hudson[109] involved a California wife who had commenced a divorce action in California. While the action was pending, her husband obtained an ex parte Idaho divorce. Mrs. Hudson continued to prosecute her divorce action, however, as an action on the alimony claim alone. Although Dimon v.

Dimon[110] could have been distinguished, the court overruled its Dimon decision. Hudson held that the right of a wife to support following an ex parte divorce must be determined by the law of the wife's domicile at the time of the divorce. Under California law, the right to support that is incident to a marriage continues when that marriage is dissolved by an ex parte divorce.

Finally, in Weber v. Superior Court,[111] the court held that a former wife could maintain a support action against her former husband although he had obtained an ex parte divorce long prior to the initiation of the support action.

From these cases, it seems clear that under California law a spouse's right of support survives an ex parte divorce obtained by the other spouse. No California case since Dimon has actually involved a situation where the spouse seeking support was the divorce plaintiff. But in view of the fact that Dimon was overruled, not distinguished, it seems safe to say that California will recognize the survival of the marital support right regardless of the identity of the spouse obtaining the ex parte divorce.

When the former spouse seeking post-divorce support was not domiciled in California at the time of the divorce, it seems fairly clear that the California courts will determine whether there is a post-divorce support right by looking to the law of the support-plaintiff's domicile as of the time of the divorce. It was by application of this choice of law rule that the court arrived at its decision in Worthley and in Hudson; and it was this choice of law rule that was advocated in the dissent to the overruled Dimon decision.

These cases seem to have solved most of California's substantive problems relating to the right to support after an ex parte divorce. A few still remain, however.

It is apparent that California counsel do not know what kind of an action to bring to obtain support following an ex parte divorce. In Weber v. Superior Court,[112] the plaintiff wife brought a divorce action despite the fact that the marriage had been dissolved by an ex parte divorce almost three years previously.

It is not clear what defenses may be raised to defeat a claim for support following an ex parte divorce. There is some language in the Dimon dissent suggesting that the support-defendant might contest the merits of the divorce action--not for the purpose of attacking the divorce, but for the purpose of defeating the support claim. This suggestion seems ill-founded. Showing the divorce was improperly granted seems merely to show the continued existence of the duty to support.[113] As pointed out earlier, California law permits a court to award support in a divorce action even though it denies the divorce. California law also creates certain defenses to support actions brought during marriage.[114] It is not clear the extent to which these would be applicable to a claim for support following ex parte divorce.

The cases suggest no way in which a former spouse who could have defeated a support claim made during marriage or in a contested divorce action may initiate an action to obtain an adjudication of his support obligation following an ex parte divorce. During the marriage, such a person could sue for divorce, and if successful could obtain a judgment forever cutting off a further claim for the support of his spouse.[115] The cases do not suggest any way in which a similar judgment might be obtained after an ex parte divorce.

It will be recalled that the right of a spouse to obtain support from the other spouse is determined in most states by looking to the law of the obligor's domicile.[116] The California cases indicate that whether the right

to support survives an ex parte divorce must be determined by looking to the law of the obligee's domicile as of the time of the divorce.[117] It is not clear whether these rules are inconsistent or whether the courts are merely holding that survival of the right is determined by the law of the obligee's domicile even though the substance of the right itself may be determined by reference to the law of the obligor's domicile.

The California courts have not yet dealt with the question whether the right to support survives a divorce obtained by the wife in an ex parte proceeding even though she could have brought her husband under the personal jurisdiction of the court. It can be argued that she should be precluded from "splitting her cause of action" by proceeding only with the ex parte divorce when she could have litigated both her right to a divorce and her right to support in a single, adversary proceeding.

RECOMMENDATIONS

Without legislative guidance, the California Supreme Court can undoubtedly provide sound solutions for most of the remaining problems; but it will be years before the existing uncertaintiess will be eliminated by judicial decision. In the interim, persons entitled to support may be denied their rights, and persons entitled to be relieved from support obligations may be required to provide support, because there is not enough at stake in the particular case to warrant an appeal to the Supreme Court. If sound solutions can be conceived, therefore, the interest of the parties who are involved in these unfortunate domestic situations would be best served by the enactment of these solutions as statutes.

In this portion of the study, we will consider the extent to which various factors should be considered in determining whether there is or should

be a post-divorce right of support and will recommend solutions to the problems that we have identified.

The identity of the divorce plaintiff. If the husband was the divorce plaintiff, and if the wife obtained a support decree from a court of a state which recognizes the continuance of her support rights following an ex parte divorce, the full faith and credit clause requires this state to give the support decree the same effect that it has in the state where rendered and enforce it against the husband.[118] The divorce decree cannot affect any of the wife's support rights under that decree.[119]

Disregarding the full faith and credit clause, it seems unfair to a wife to permit a judgment to cut off her right of support when she did not have her day in court on the merits of that judgment. The social policy that impels a court to award support in a divorce proceeding when it has personal jurisdiction over the husband should also impel a court to award support if the first opportunity the wife has to assert her support right occurs after the husband has procured an ex parte divorce. Since the courts have evolved rules that allow a husband readily to obtain a divorce, it is necessary to provide that such a divorce can have no effect on the support rights of a wife who is not subject to the personal jurisdiction of the court in order to protect the wife and prevent injustice.

If the wife was the divorce plaintiff, it can be argued that by obtaining the divorce she voluntarily surrendered her support right. Certainly, if the effect of the decree where rendered was to terminate her support rights, the full faith and credit clause requires this state to give the decree the same effect. But, unless the divorce is obtained in a jurisdiction that terminates support rights upon divorce, the argument that the wife has voluntarily

surrendered her support rights seems unsound. If personal jurisdiction over the husband cannot be secured in the state where the wife is domiciled, it is impossible for the wife to litigate the question of support at the time of the divorce. To deny her the right to litigate that right later thus forever denies the wife her day in court and permits the husband, by deserting, to forever escape the obligations he incurred by his marriage. No desirable public policy is served by forcing a wife who needs support to choose between retaining a marital status which is a marriage in name only and retaining her right of support.

In the light of these considerations, it is recommended that a right of support should exist following an ex parte divorce regardless of whether the wife or the husband was the divorce plaintiff.

Amenability of the divorce defendant to the personal jurisdiction of the divorce court. Under the law of some jurisdictions, it is possible for a plaintiff to determine by the manner in which he proceeds whether the defendant will be subject to the court's personal jurisdiction or not. In California, the problem can arise as follows: Code of Civil Procedure Sections 412 and 413 describe the conditions under which service by publication may be authorized and describe the procedure for serving by publication. Service by publication is authorized where the person to be served (1) resides out of the state, (2) has departed from the state, (3) cannot after due diligence be found within the state, or (4) conceals himself to avoid the service of summons. Service by publication is made by publishing the summons in a newspaper and, where the defendant's residence is known, by mailing a copy of the summons and complaint to the defendant. Personal service outside the state may be substituted for publication and mailing. A California court can acquire

personal jurisdiction over a defendant who is a domiciliary of the state although the defendant is not served personally so long as the defendant has not departed from the state.[120] But Code of Civil Procedure Section 417 provides that, if service was made pursuant to Sections 412 and 413, a court has power to render a personal judgment against a person outside the state only if he was personally served with a copy of the summons and complaint and was a resident of the state (1) at the time of the commencement of the action, (2) at the time the cause of action arose, or (3) at the time of service.

Thus, a plaintiff wife whose husband is still a domiciliary of California, but whose whereabouts outside the state are known to the wife, may choose to serve the defendant either by publication and mailing or by personal service outside the state. If she chooses the former course, she cannot secure a personal judgment; but if she follows the latter course, she can.

The question is whether the plaintiff wife should lose the right to support after an ex parte divorce if she fails to proceed by way of personal service outside the state against a domiciliary husband who is out of the state. We suggest she should not.

To bar the subsequent claim in such a situation would require the court in the later case to probe the mind of the former wife to determine whether she knew of the defendant's whereabouts, had reason to suspect that he might move before personal service could be made, could reasonably procure personal service upon him at that place, etc.

No public policy is served by barring the wife's support claim in such a case. The husband is not twice vexed by support-seeking litigation--he was not required to and did not appear in the first case. If it would have been

more convenient for him to litigate the support issue in the divorce action, he could have appeared and thus forced the litigation of the issue. No judicial determination is called in question by a person adversely affected thereby.

On the other hand, barring the wife's claim would require the support-court to determine whether she acted reasonably in proceeding as she did. She may have proceeded by publication because she did not know exactly where he was; she may not have desired to force him to return to the state because she believed that it would be more convenient for him to return later; she may have believed that he would move before she could transmit the court's process and have it served upon him. A wrong guess on her part as to how reasonable her actions would appear to a later court would cost her her right to support. There is no reason to rest her right to support on such a tenuous basis.

It is recommended, therefore, that res judicata should be applied to bar a post-divorce action for support only where the defendant was personally before the divorce court.

Choice of law

The California cases have held that whether the right of a wife to support survives an ex parte divorce should be determined under the law of her domicile at the time of the divorce.[121] Under the law of most states, the substance of a spouse's right to support is determined under the law of the other spouse's domicile.[122] Our problem here is to determine whether either or both of these rules should be retained.

It is recommended that both of these choice of law rules be continued subject to the qualification that the law of the obligor's domicile at the time of the divorce should determine the substance of the support right thereafter.

Survival of the support right. If the wife was the divorce plaintiff, and under the law of her domicile the right to marital support does not survive divorce, the full faith and credit clause requires other states to recognize that the support right is terminated by the divorce.[123] If the husband is the divorce plaintiff, the divorce court is without power to adversely affect whatever right of support the wife has under the law of her domicile.[124]

Thus, the Constitution requires application of the law of the wife's domicile to determine whether her right of support survives ex parte divorce except in the case where the wife is the divorce plaintiff and under the law of her domicile the right of support survives divorce. Apparently, in this circumstance the courts would be free to apply the law of the husband's domicile. But inasmuch as policy considerations discussed above indicate that the right of support should survive an ex parte divorce procured by the wife, here too the most desirable law to choose is that of the wife's domicile at the time of the divorce.

When the husband is the divorce plaintiff and the right of support does not survive under the law of the wife's domicile, it is uncertain whether the Constitution permits any court to hold that the right of support does not survive. It is arguable that the United States Supreme Court cases hold that an ex parte divorce obtained by the husband cannot affect whatever right of support the wife had prior to the termination of the marriage under the law of her domicile, that for support purposes the divorce must be regarded as a nullity and the parties must be regarded as subject to all of their pre-divorce support rights and duties.

It is neither necessary nor desirable to attempt to predict whether the United States Supreme Court will permit the state of the wife's domicile to

terminate her right to support upon termination of the marriage by an ex parte divorce procured by the husband. If a state can so terminate a right of support, it would be undesirable to permit that right to be revived merely by the migration of the wife to another state. If California provided by statute that an expired right to support could be revived simply by the migration of the obligee to California, the state could well become a haven for divorced wives who could not obtain relief in any other jurisdiction. A husband could never know whether he was free from his marital support obligation or not; for at any time his wife might move to California and commence a support action. His ability to plan for the future would be seriously impaired. As stated by Mr. Justice Schauer:

> If there is to be a divorce at all it is the better public policy that the decree of divorce shall settle for all time the rights and obligations of the parties to the dissolved marriage to the end that litigation arising from such marriage shall end and be known to have ended, and that the parties may have an opportunity to build to a future, free from, and perhaps the better for, the past, rather than to be wrecked by recurring litigation.[125]

If a state cannot validly terminate an obligee's right of support, a law so providing will eventually be held to be unconstitutional, and all states at the same time will be compelled to recognize the continuance of the marital support right. But since it is impossible to determine in advance of a decision on the question what the constitutional rule is, it is recommended that the legislatively prescribed rule require that in all cases the survival of the support right be determined by the law of the wife's domicile at the time of the divorce to guard against the eventuality that termination of the right upon an ex parte divorce obtained by the husband is constitutional.

The substance of the support right. If the survival of the marital support right is to be determined under the law of the obligee's domicile,

should the substance of that right also be determined under the law of the obligee's domicile? The answer must be "No" unless the nature of the obligee's right is to be drastically changed by the ex parte divorce. It must be remembered that under the law of most states, the obligee's right of support is determined by reference to the substantive law of the obligor's domicile.[126] It is the right of support under the law of the obligor's domicile that survives the ex parte divorce.

Inasmuch as all states require husbands to support their wives, the choice of law is not too significant when it is the wife or former wife who is seeking support. But when it is a former husband who seeks support, the need to apply the substantive law of the obligor's domicile becomes glaringly apparent. Suppose this case: H and W live in Colorado (which does not require wives to support their husbands[127]). They separate, H coming to California and W establishing residence in Arizona. While the marriage continues, H's right to support from W will be determined under Arizona law, for he can get a personal judgment against W only by suing her in Arizona or by proceeding under the Uniform Reciprocal Enforcement of Support Act, Arizona's version of which requires application of the law where the obligor resides.[128] Since Arizona does not require wives to support their husbands,[129] H has no right of support while the marriage continues. When the marriage is dissolved by an ex parte divorce, should the law used to determine H's support right then be California's law (which requires wives to support their husbands) or should it still continue to be Arizona's law?

Since the theory of support following ex parte divorce is that the support rights incident to the marriage are unaffected by the ex parte divorce, Arizona law--the law of the obligor's domicile--should be applied to determine the post-divorce support right because the marital support right was determined

under Arizona law. Moreover, it would be difficult to justify application of California law when the person required to perform under that law has (in the supposed case) never resided in California nor in any other state that required wives to support their husbands. As Professor Morris points out, it is short sighted to argue that California's interest in the economic interest of its domiciliary should be the predominate concern, for Arizona is equally concerned with the economic interest of its domiciliary.[130]

Accordingly, it is recommended that in those cases where the right of support, if any, survives ex parte divorce, the substantive law to be applied to determine the right of support should be the law of the obligor's domicile.

As of what time should the law of the obligor's domicile be determined--as of the time of the ex parte divorce or as of the time when support is sought?

It can be argued that the substantive law applicable should be determined as of the time of the ex parte divorce. The later action for support is authorized because the support rights incident to the marriage could not be determined at the time of the divorce. But, although these rights could not be determined at that time, when the parties are finally brought personally before the same court the court should attempt to determine the parties' support rights and obligations in the way that they should have been determined at the time of the divorce action. Moreover, if the parties are no longer married to each other, their rights and obligations should be viewed as of the time of the divorce so that they can plan for the future undeterred by any fear that their rights and obligations may change as they migrate from state to state.

On the other hand, it can be argued that the ex parte divorce should be totally disregarded insofar as support rights are concerned. Because the parties could not litigate their marital obligations in the ex parte divorce action, the fact that the action occurred and a divorce decree was rendered

should be of no consequence when a later right of support is asserted. Hence, in the support action, the court should apply the same law that it would if the parties were still married--the law of the obligor's domicile during the period for which support is sought. If future support is sought, the applicable law should be the law of the obligor's domicile at the time of the support action.

Determining the applicable substantive law as of the time of the support action would tend to minimize the need for the support forum to determine the law of other states. It seems probable that few support actions will be brought against nonresident defendants because of the difficulty of obtaining personal jurisdiction. Hence, in most cases, the support forum would be applying its own substantive law of support.

Although we are not free from doubt, on balance we prefer requiring determination of the substantive support law as of the time of the divorce action.

Defenses

If a husband is sued by his wife for support, under California law he can cross-complain for divorce. If he is successful on his cross-complaint, and if no divorce or separate maintenance decree is awarded to the wife at the same time, the court is powerless to order the husband to support the wife.[131] If both parties are granted divorces, whether one can be required to support the other is determined in accordance with the doctrine of "clean hands."[132] Apparently, too, equitable defenses may be raised against any action for support, whether or not spouses or marital rights are involved.[133]

Legislation regulating support after ex parte divorce should make clear that defenses such as these that may be asserted under the applicable substantive law may be asserted in defense against a post-divorce support claim.

Post-divorce support actions

Hudson v. Hudson[134] suggests that the post-divorce right of support can be enforced in an independent action in equity. The suggestion has apparently been overlooked, for divorce actions have been brought to enforce the post-divorce right of support despite the fact that the marriage was already terminated.[135] The Uniform Civil Liability for Support Act[136] and the Uniform Reciprocal Enforcement of Support Act[137] provide statutory authority for interspousal support actions independent of the actions for divorce and separate maintenance. Since the theory under which post-divorce support actions may be maintained is that the marital right of support was undisturbed by the ex parte divorce, there is reason to believe that a support claimant may proceed under these acts after an ex parte divorce as well as before. It is recommended that a minor statutory adjustment be made in order to make it clear that these acts can be used to enforce the post-divorce right of support.

During a marriage, an obligor spouse has the right to bring an action for divorce and obtain an adjudication that his obligation to support the obligee spouse no longer exists. It would be unfair to an obligor to provide an obligee with a form of action to enforce post-divorce support and fail to provide the obligor with a form of action to terminate his post-divorce support obligations comparable to that which he has prior to divorce. The courts have provided the obligee with a post-divorce support action. Legislative action, however, seems necessary to provide an obligor with a post-divorce action to obtain an adjudication of his support obligations.

Accordingly, it is recommended that legislation be proposed that would give a former spouse a right of action to terminate support obligations equivalent to that which he has during marriage.

FOOTNOTES

1. Worthley v. Worthley, 44 Cal.2d 465, 283 P.2d 19 (1955); Lewis v. Lewis, 49 Cal.2d 389, 317 P.2d 987 (1957); Hudson v. Hudson, 52 Cal.2d 735, 344 P.2d 295 (1959); Weber v. Superior Court, 53 Cal.2d 403, 2 Cal. Rptr. 9, 348 P.2d 572 (1960).

2. See, e.g., Hudson v. Hudson, 52 Cal.2d 735, 739-740, 344 P.2d 295 (1959).

3. CIV. CODE §§ 155, 242.

4. CIV. CODE § 175.

5. Estate of Ferrall, 41 Cal.2d 166, 258 P.2d 1009 (1953); Davis v. Davis, 65 Cal. App. 499, 224 Pac. 478 (1924).

6. CIV. CODE §§ 155, 176, 243.

7. CIV. CODE §§ 176, 243.

8. CIV. CODE § 137; Livingston v. Superior Court, 117 Cal. 633, 49 Pac. 836 (1897); Jenkins v. Jenkins, 125 Cal. App.2d 109, 269 P.2d 908 (1954).

9. A dictum in Hardy v. Hardy, 97 Cal. 125, 127, 31 Pac. 906 (1893), supports this view.

10. CIV. CODE §§ 136, 248; Hagle v. Hagle, 68 Cal. 588, 9 Pac. 842 (1886); Galland v. Galland, 38 Cal. 265 (1869); Parnay v. Parnay, 55 Cal. App.2d 703, 131 P.2d 562 (1942); Booth v. Booth, 100 Cal. App. 28, 279 Pac. 458 (1929). Cf. Hudson v. Hudson, 52 Cal.2d 735, 344 P.2d 295 (1959).

11. Monroe v. Superior Court, 28 Cal.2d 427, 170 P.2d 473 (1946).

12. 3 VERNIER, AMERICAN FAMILY LAWS 47, 102, 109 (1935).

Although the common law gave the wife a right of support, the common law rule forbidding one spouse from suing the other precluded her from bringing action to enforce her right. BROMLEY, FAMILY LAW 195 (2d ed. 1962). "The only legal reason why a husband should support his wife

is, that she may not become a burden upon the parish. So long as that calamity is averted, the wife has no claim on her husband. And in fact she has no direct claim upon him under any circumstances whatever; for even in the case of positive starvation she can only call upon the parish for relief. And the parish authorities will insist that the husband shall provide for her, when he is able, to the extent at least of sustaining life. If the husband fail in this respect, so that his wife becomes chargeable to any parish, the 5 Geo. 4, c. 83, s. 3 says, that 'he shall be deemed an idle and disorderly person, and shall be punishable with imprisonment and hard labor'." MACQUEEN, HUSBAND AND WIFE 42-43 (1848).

The common law permitted the wife to pledge the husband's credit in order to secure the necessities that he would not provide. But this was "a singularly inadequate remedy, for its efficacy depends upon her being able to find a tradesman who is prepared to give the credit asked for, and a husband who has failed in his obligation to his wife is hardly likely to be a satisfactory debtor." BROMLEY, FAMILY LAW 195 (2d ed. 1962).

13. 9C U. L. A. (1964 Supp. 10-12):

BASIC DUTY OF SUPPORT IMPOSED

BY STATE LAW

Code

A—Husband liable for support of wife.
B—Wife liable for support of husband in need and unable to support himself.
C—Both mother and father liable for support of minor legitimate children.
D—Father alone liable for support of minor legitimate children.
E—Both mother and father liable for support of illegitimate children.
F—Father alone liable for support of illegitimate children.
G—Child liable for support of needy parent or parents.
H—Brother liable for support of needy brother or sister.
I—Grandparent liable for support of needy grandchild.
J—Grandchild liable for support of needy grandparent.
K—Sister liable for support of needy brother or sister.
L—Other support liability (such as guardians, etc.)

Note: Although details are not shown below, in most states parents are liable for support of children above the ages shown if the children are in need and handicapped.

Alabama ..... A, C (under 18), F, G, H, I, J
Alaska ..... A, B, C (under 20), E (under 16), G, H, I, J, K, L
Arizona ..... A, D, E
Arkansas ..... A, B, C (father liable for children under 16, mother for children under 14), F (under 14)

California ..... A, B, C, E, G
Colorado ..... A, D (under 16), F (under 16), G, H, I, J, K
Connecticut ..... A, B, C, E, G
Delaware ..... A, B, C, E, G
District of Columbia ..... A, C, E (to age 16 after adjudication), G (qualified), J (qualified), L
Florida ..... A, C (mother's liability is subsidiary)
Georgia ..... A, C (under 18) (mother's liability is subsidiary), E, G (qualified), L

Guam ..... A, B, C, E, G
Hawaii ..... A, C (under 20), E (under 20), G
Idaho ..... A, B, C, G
Illinois ..... A, B, C (under 18) (mother's liability is subsidiary), E, G, H, K
Indiana ..... A, C (mother liable to age 14; father liable to age 18 for boys, to age 17 for girls), E, G
Iowa ..... A, C (under 17) (mother's liability is subsidiary), G, I, J

Kansas ..... A, B (if husband in certain state institutions), C, E
Kentucky ..... A, C (mother's liability is subsidiary), E
Louisiana ..... A, B, C, E, G, I, J
Maine ..... A, B, C, E, G, I, J
Maryland ..... A, C, E, G
Massachusetts ..... A, C, E, G
Michigan ..... A, B, C, E, G
Minnesota ..... A, B (only if disabled), C, E (if there is an adjudication) G, H, I, J, K, M

Mississippi ..... A, C, E
Missouri ..... A, C
Montana ..... A, B, D (under 16), G, H, I, J, K
Nebraska ..... A, C, E, G, H, I, J, K
Nevada ..... A, B, C, E
New Hampshire ..... A, C, G
New Jersey ..... A, B, C, E, G, I, J
New Mexico ..... A, B, C (mother liable only for children under 16), E

New York ..... A, B, C (under 21) (mother's liability is subsidiary), E, G, I
North Carolina ..... A, C (under 18), E (under 18)
North Dakota ..... A, B, C (under 16), E (under 16), G
Ohio ..... A, B, C (under 18 unless handicapped), E, G
Oklahoma ..... A, B, C, F
Oregon ..... A, C (civil liability until children 21), F, G (qualified)

Pennsylvania ..... A, B, C, E, G (qualified)
Puerto Rico ..... A, B, C, E, G, H, I, J, K, L
Rhode Island ..... A, C (under 18), G
South Carolina ..... A, C (mother's liability is subsidiary), F (but some courts do not recognize), G

South Dakota ..... A, B, C, E, G
Tennessee ..... A, C
Texas ..... A (for necessities), C (under 18 in divorce cases, under 16 otherwise)
Utah ..... A, B, D, F, G, H, I, J, K
Vermont ..... A, B, C
Virginia ..... A, C (under 17 unless handicapped), F, G
Virgin Islands ..... A, C (under 17) (mother's liability is subsidiary), G, I, J

Washington ..... A, B, C, E
West Virginia ..... A, C, F, G, H, K
Wisconsin ..... A, D, F, G
Wyoming ..... A, C, K

14. See note 12, supra.

15. KEEZER, MARRIAGE AND DIVORCE 331 (3d ed. 1946).

16. 3 NELSON, DIVORCE § 32.03 (2d ed. 1945).

17. Ibid.

18. Ibid.

19. We do not consider the case where the first court did not have personal jurisdiction over the husband. Familiar principles of due process preclude a court from rendering a decree that is personally binding upon a defendant over whom the court lacks personal jurisdiction. Pennoyer v. Neff, 95 U.S. 714 (1878); Glaston v. Glaston, 69 Cal. App.2d 787, 160 P.2d 45 (1945).

20. Barber v. Barber, 21 How. 582, 591 (1859).

21. Sistare v. Sistare, 218 U.S. 1, 17 (1909).

22. Sistare v. Sistare, 218 U.S. 1, (1909); Lynde v. Lynde, 181 U.S. 187 (1901). In Worthley v. Worthley, 44 Cal.2d 465, 468-469, 283 P.2d 19 (1955), Mr. Justice Traynor noted: "In recent cases the United States Supreme Court has expressly reserved judgment on the question of full faith and credit to modifiable judgments and decrees (see Barber v. Barber, 323 U.S. 77, 81; Griffin v. Griffin, 327 U.S. 220, 234; but see Halvey v. Halvey, 330 U.S. 610, 615), and the late Mr. Justice Jackson, a foremost expounder of the law of full faith and credit in recent years, forcefully declared that modifiable alimony and support decrees are within the scope of that clause . . . . (Concurring opinion, Barber v. Barber, 323 U.S. 77, 87.)"

23. Halvey v. Halvey, 330 U.S. 610 (1947).

24. Griffin v. Griffin, 327 U.S. 220 (1946).

25. Worthley v. Worthley, 44 Cal.2d 465, 283 P.2d 19 (1955).

26. 9C U. L. A. 2 (1957); 9C U. L. A. (Supp. 1964 at 34).

27. 9C U. L. A. 2 (1957); 9C U. L. A. (Supp. 1964 at 10).

28. See, Uniform Reciprocal Enforcement of Support Act (1958 Act) § 2(11):

" 'Support order' means any judgment, decree, or order of support whether temporary or final, whether subject to modification, revocation or remission regardless of the kind of action in which it is entered."

See also, Worthley v. Worthley, 44 Cal.2d 465, 472, 283 P.2d 19 (1955)(dictum).

29. See note 11, supra, and accompanying text.

30. 290 U.S. 202 (1933).

31. Anno., 36 A.L.R.2d 1369; Van Rensselaer v. Van Rensselaer, 164 A.2d 244, 246 (N.H. 1960)(concurring opinion).

32. Anno., 74 A.L.R. 1242.

33. Hiner v. Hiner, 153 Cal. 254, 94 Pac. 1044 (1908).

34. Bullard v. Bullard, 189 Cal. 502, 505, 209 Pac. 361 (1922).

35. 40 Cal.2d 516, 254 P.2d 528 (1953).

36. Hudson v. Hudson, 52 Cal.2d 735, 344 P.2d 295 (1959).

37. 40 Cal.2d at 540.

38. Cal. Stats. 1955, Ch. 835, § 1.

39. Van Rensselaer v. Van Rensselaer, 164 A.2d 244, 246 (N.H. 1960).

40. 9C U. L. A. (Supp. 1964 at 34).

41. Berkley v. Berkley, 246 S.W.2d 804, 34 A.L.R.2d 1456 (Mo. 1952); Anno., 34 A.L.R.2d 1460; Hiner v. Hiner, 153 Cal. 254, 94 Pac. 1044 (1908).

42. State of California v. Copus, 158 Tex. 196, 309 S.W.2d 227, cert. denied, 356 U.S. 967 (1958).

43. State of California v. Copus, 158 Tex. 196, 309 S.W.2d 227, cert. denied, 356 U.S. 967 (1958); Commonwealth v. Mong, 160 Ohio St. 455, 117 N.E.2d 32 (1954).

44. 158 Tex. 196, 309 S.W.2d 227, cert. denied, 356 U.S. 967 (1958).

45. But see Dept. of Mental Hygiene v. Kirchner, 59 Cal.2d 247, 28 Cal. Rptr. 718, 379 P.2d 22 (1963), holding unconstitutional the statute requiring a child to contribute to the support of his parent in a state mental institution.

46. The majority opinion seems incorrect on this point. The dissent quotes Texas Probate Code Section 423 as follows: "Where an incompetent has no estate of his own, he shall be maintained . . . by the children and grandchildren of such person respectively if able to do so . . . ." The parent was clearly incompetent, and the quoted Texas statute clearly imposed upon the defendant a duty of support. Since the State of California had discharged this duty of support, it could be argued that it became subrogated to the parent's right and could claim reimbursement from the defendant for expenses incurred in discharging the defendant's support obligation. See, Anno., 116 A.L.R. 1281, pointing out that most courts hold that a third party who provides assistance to someone in need can recover from the person whose failure to support created the need.

47. See, Historical Note appended to Section 7 of the Uniform Reciprocal Enforcement of Support Act (1952 Act) 9C U. L. A. (1957).

48. See, Statutory Notes appended to Section 7 of the Uniform Reciprocal Enforcement of Support Act (1952 Act), 9C U. L. A. (1957).

49. The dissenting opinion did not dismiss the reciprocal act so lightly. It regarded the enactment of the reciprocal act as a declaration of policy by the Texas Legislature. This seems to be the sounder view. The majority opinion makes the substantive right to relief depend upon the procedure used to enforce that right. The California Supreme Court in an analogous

situation has relied on the reciprocal act as a declaration of policy to avoid creating two rules--one that applies in reciprocal act proceedings and another that applies in other proceedings. See, Worthley v. Worthley, 44 Cal.2d 465, 472-473, 283 P.2d 19 (1955).

50. 160 Ohio St. 455, 117 N.E.2d 32 (1954).

51. Uniform Reciprocal Enforcement of Support Act § 7, 9C U. L. A. (1957).

52. 9C U. L. A. 1-2 (1957), 9C U. L. A. (Supp. 1964 at 9, 34).

52.1 See, Statutory Notes to Section 7 of the Uniform Reciprocal Enforcement of Support Act, 9C U. L. A. (1957), 9C U. L. A. (Supp. 1964 at 17), and the Table of States adopting the 1958 version of the reciprocal act, 9C U. L. A. (Supp. 1964 at 34).

53. See Note 13, supra.

54. 9C U. L. A. (1957).

55. Stimson, Simplifying the Conflict of Laws, 36 A.B.A. JOUR. 1003 (1950).

56. 36 A.B.A. JOUR. at 1005.

57. 36 A.B.A. JOUR. at 1004.

58. Note the discussion of residence and domicile in Ehrenzweig, Interstate Recognition of Support Duties, 42 CALIF. L. REV. 382, 388-389 (1954). See also, Note, 6 U.C.L.A. L. REV. 145 (1959).

59. See the text accompanying notes 44-49.

60. De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345 (1896).

61. Ex parte Spencer, 83 Cal. 460, 23 Pac. 395 (1890); Arnold v. Arnold, 76 Cal. App.2d 877, 174 P.2d 674 (1946).

62. Lampson v. Lampson, 171 Cal. 332, 153 Pac. 238 (1915).

63. De Burgh v. De Burgh, 39 Cal.2d 858, 250 P.2d 598 (1952); Salvato v. Salvato, 195 Cal. App.2d 869, 16 Cal. Rptr. 263 (1961).

64. Hager v. Hager, 199 Cal. App.2d 259, 18 Cal. Rptr. 695 (1962).

65. Douglas v. Douglas, 164 Cal. App.2d 230, 330 P.2d 659 (1958); Simpson v. Simpson, 21 Cal. App. 150, 131 Pac. 99 (1913).

66. CIV. CODE § 108.

67. CIV. CODE § 139.

68. Bowman v. Bowman, 29 Cal.2d 808, 178 P.2d 751 (1947).

69. CIV. CODE § 139.

70. Howell v. Howell, 104 Cal. 45, 37 Pac. 770 (1894).

71. Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1 (1943).

72. Tonnesen v. Tonnesen, 126 Cal. App.2d 132, 271 P.2d 534 (1954).

73. 2 NELSON, DIVORCE AND ANNULMENT, § 14.11 (2d ed. 1961 Rev. Volume).

74. 2 NELSON, DIVORCE AND ANNULMENT, § 14.06 (2d ed. 1961 Rev. Volume).

75. 2 NELSON, DIVORCE AND ANNULMENT, § 14.17 (2d ed. 1961 Rev. Volume).

76. Anno., 6 A.L.R.2d 1277.

77. Anno., 43 A.L.R.2d 1387.

78. Lynn v. Lynn, 302 N.Y. 193, 97 N.E.2d 748, 28 A.L.R.2d 1335 (1951), cert. denied, 342 U.S. 849; Miele v. Miele, 25 N.J. Super. 220, 95 A.2d 768 (1953). The Miele case involved a former wife who sued in New Jersey for support pursuant to a New Jersey statute that provides: " . . . [A]fter decree of divorce, whether obtained in this State or elsewhere, the Court of Chancery may make such order touching the alimony of the wife . . . as the circumstances of the parties and the nature of the case shall render fit, reasonable and just . . . ." The New Jersey court held that the support action should be dismissed because the Nevada judgment barred further relief in Nevada and the full faith and credit clause required New Jersey to give the Nevada decree the same force and effect that it had in Nevada.

" . . . New Jersey will not be suffered to become a resort for wives whose matrimonial ties to their spouses have been severed in other jurisdictions and who, lacking further remedies there because of the finality and conclusiveness of the judgment entered in the litigation, seek out the New Jersey courts as a forum for additional relief not available in the foreign forums." 25 N.J. Super. at ____, 95 A.2d at 771.

79. Cooper v. Cooper, 314 Ky. 413, 234 S.W.2d 658 (1950).

80. Williams v. North Carolina, 325 U.S. 226 (1945).

81. Williams v. North Carolina, 317 U.S. 287 (1942).

82. 334 U.S. 541 (1948).

83. 354 U.S. 416 (1957).

84. 350 U.S. 568, 575 (1946).

85. 325 U.S. 279, 281 (1945).

86. Williams v. North Carolina, 325 U.S. 226 (1945).

87. 350 U.S. at 576.

88. See Hudson v. Hudson, 52 Cal.2d 735, 740, 344 P.2d 295 (1959).

89. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).

90. Armstrong v. Armstrong, 350 U.S. 568, 575 (1956)(concurring opinion). This concurring opinion was cited as a partial basis for the majority opinion in the Vanderbilt case, 354 U.S. 416, 419.

91. This proposition must be inferred from the discussion of Pennoyer v. Neff, 95 U.S. 714 (1878), in Mr. Justice Black's majority opinion in the Vanderbilt case and his concurring opinion in the Armstrong case. See the dissenting opinion of Mr. Justice Harlan in the Vanderbilt case: "The Court holds today, as I understand its opinion, that Nevada, lacking personal jurisdiction over Mrs. Vanderbilt, had no power to adjudicate the question

of support, and that any divorce decree purporting so to do is to that extent wholly void--presumably in Nevada as well as in New York--under the Due Process Clause of the Fourteenth Amendment, pursuant to the doctrine of Pennoyer v. Neff, 95 U.S. 714." 354 U.S. at 428.

92. Vanderbilt v. Vanderbilt, 354 U.S. 416, 419 (1957). It has been Mr. Justice Black's consistent position throughout these cases that the full faith and credit clause requires the courts of each state to give a judgment rendered by a court of another state the same effect that the judgment has in the state where rendered. See his dissenting opinion in Williams v. North Carolina, 325 U.S. 226, 244 (1945). " . . . North Carolina cannot be permitted to disregard the Nevada decrees without passing upon the 'faith and credit' which Nevada itself would give to them under its own 'law or usage.'" 325 U.S. at . Hence, it is implicit in the opinions written by Mr. Justice Black that ex parte divorce decrees cannot be given any effect even in the state where rendered insofar as they affect or purport to affect the support rights of the absent parties.

93. Esenwein v. Commonwealth ex rel. Esenwein, 325 U.S. 279, 281 (1945).

94. Williams v. North Carolina, 325 U.S. 226 (1945).

95. 327 U.S. 220 (1946).

96. Id. at 228-229. See also the opinion of Mr. Justice Black in Armstrong v. Armstrong, 350 U.S. 568, 575 (1956) where he asserted that a legislative divorce, though effective to terminate the marital status, cannot "create or destroy financial obligations incident to marriage." 350 U.S. at 580.

97. Annot., 28 A.L.R.2d 1378.

98. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1956).

99. See the dissenting opinion of Mr. Justice Traynor in Dimon v. Dimon, 40

Cal.2d 516, 526, at 540: "If the wife was the plaintiff in the divorce action, and under the law of the state granting the decree the right did not survive the divorce, the full faith and credit clause would compel California to give the same effect to the decree and hold that the decree not only dissolves the marriage status but terminated the wife's right to support." See also note 78 and the accompanying text.

100. The facts are quite fully reported in Dimon v. Dimon, 244 P.2d 972 (Cal. App. 1952).

101. Dimon v. Dimon, 40 Cal.2d 516, 254 P.2d 528 (1953).

102. 40 Cal.2d at 541.

103. 44 Cal.2d 465, 283 P.2d 19 (1955).

104. 49 Cal.2d 389, 317 P.2d 987 (1957).

105. 52 Cal.2d 735, 344 P.2d 295 (1959).

106. 53 Cal.2d 403, 2 Cal. Rptr. 9, 348 P.2d 572 (1960).

107. 44 Cal.2d 465, 283, P.2d 19 (1955).

108. 49 Cal.2d 389, 317 P.2d 987 (1957).

109. 52 Cal.2d 735, 344 P.2d 295 (1959).

110. 40 Cal.2d 516, 254 P.2d 528 (1953). See notes 100-102 and the accompanying text.

111. 53 Cal.2d 403, 2 Cal. Rptr. 9, 348 P.2d 572 (1960).

112. 53 Cal.2d 403, 2 Cal. Rptr. 9, 348 P.2d 572 (1960).

113. See note 10 and the accompanying text.

114. See notes 4 and 7 and the accompanying text.

115. See notes 62-65 and the accompanying text.

116. See notes 41-59 and the accompanying text.

117. Hudson v. Hudson, 59 Cal.2d 735, 344 P.2d 295 (1959).

118. Lewis v. Lewis, 49 Cal.2d 389, 317 P.2d 987 (1957).

119. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Estin v. Estin, 334 U.S. 541 (1948).

120. Miller v. Superior Court, 195 Cal. App.2d 77, 16 Cal. Rptr. 36 (1961).

121. Hudson v. Hudson, 52 Cal.2d 735, 344 P.2d 295 (1959).

122. See notes 41-59 and the accompanying text.

123. See note 99 and the accompanying text.

124. See notes 82 and 83 and the accompanying text.

125. Dimon v. Dimon, 40 Cal.2d 516, 545, 254 P.2d 528, ____(1953)(concurring opinion).

126. See notes 41-59 and the accompanying text.

127. See note 13, supra.

128. See note 52 and the accompanying text.

129. See note 13, supra.

130. Morris, Divisible Divorce, 64 HARV. L. REV. 1287, 1294 (1951).

131. See notes 62-65 and the accompanying text.

132. See note 63 and the accompanying text.

133. Cf. Radich v. Kruly, 226 Cal. App.2d 683, 38 Cal. Rptr. 340 (1964).

134. 52 Cal.2d 735, 344 P.2d 295 (1959).

135. See Weber v. Superior Court, 53 Cal.2d 403, 2 Cal. Rptr. 9, 348 P.2d 572 (1960).

136. CIVIL CODE §§ 241-254.

137. CODE CIV. PROC. §§ 1650-1692.